

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

DAVID SAMUEL MARTÍNEZ-VÉLEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 02-2515 (JAF)

(Crim. No. 95-029)

ORDER

Petitioner, David Samuel Martínez-Vélez, requests a certificate of appealability ("COA") from this court. (Docket No. 75.) On July 21, 2006, we issued an Opinion and Order dismissing Petitioner's petition under 28 U.S.C. § 2255. (Docket No. 60.) On June 29, 2009, Petitioner filed a motion to set aside our order under Federal Rule of Civil Procedure 60(b)(4) (Docket No. 70), which we denied on July 8, 2009 (Docket No. 71). On July 17, 2009, Petitioner moved for reconsideration of our denial. (Docket No. 72.) After we denied that motion on July 23, 2009 (Docket No. 73), Petitioner filed the instant motion on August 13, 2009 (Docket No. 75), and the United States opposed on August 19, 2009 (Docket No. 78).

To appeal a final order of the district court in § 2255 proceedings, a petitioner must first obtain a COA, 28 U.S.C. § 2253(c)(1)(B), which may issue from the district court, Grant-Chase v. Commissioner, 145 F.3d 431, 435 (1st Cir. 1998). We may grant a COA only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The applicant "must

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1 demonstrate that reasonable jurists would find the district court's
2 assessment of the constitutional claims debatable or wrong." Miller-
3 El v. Cockrell, 537 U.S. 322, 338 (2003) (quoting Slack v. McDaniel,
4 529 U.S. 473, 484 (2000)).

5 In essence, Petitioner argues that, in denying both his motion
6 to vacate our judgment and his motion for reconsideration (Docket
7 Nos. 70, 72), we denied him due process by failing to address a claim
8 that had been constructively pleaded into the case. (Docket No. 75.)
9 "[C]onsent to the trial of an issue may be implied if, during the
10 trial, a party acquiesces to the introduction of evidence which is
11 relevant only to that issue.'" Rodríguez v. Doral Mortgage Corp., 57
12 F.3d 1168, 1172 (1st Cir. 1995) (quoting DCPB, Inc. v. City of
13 Lebanon, 957 F.2d 913, 917 (1st Cir. 1992)).

14 Petitioner refers to a statement by Margaret López, a witness in
15 the principal criminal trial, introduced by his counsel during an
16 evidentiary hearing on April 24, 2006. (Docket No. 75.) Petitioner
17 contends that counsel had submitted this evidence to prove that the
18 United States had breached its duty under Brady v. Maryland, 373 U.S.
19 83 (1963), to disclose exculpatory evidence. (Id.) As the United
20 States did not object to the admission of this evidence, Petitioner
21 insists that the United States had impliedly consented to litigation
22 of his Brady claim. (Id.)

23 A review of the record, however, shows that Petitioner's counsel
24 introduced the statement at the hearing for the purpose of examining
25 López' credibility as a witness. (See Docket Nos. 55, 57, 60.) This
26 assessment guided our inquiry into the effectiveness of Petitioner's

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1 counsel at trial. (See Docket No. 60.) As Petitioner has not shown
2 that López' testimony was introduced solely for the purpose of
3 supporting a Brady violation, there is no reason to retroactively
4 amend the pleadings under Federal Rule of Civil Procedure 15(b)(2) to
5 add this claim. See Doral, 57 F.3d at 1172.

6 Because Petitioner's § 2255 petition did not include a Brady
7 claim (Docket Nos. 1, 69), we needed not consider this issue in our
8 Opinion and Order. Thus, Petitioner has not demonstrated his
9 entitlement to extraordinary relief under Rule 60(b)(4). See United
10 States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990)
11 ("A judgment is void . . . only if . . . the court's action amounts
12 to a plain usurpation of power constituting a violation of due
13 process."). We, therefore, find that no reasonable jurist could
14 disagree with our denial of Petitioner's motion under Rule 60(b)(4).
15 See Miller-El, 537 U.S. at 338.

16 Accordingly, we hereby **DENY** Petitioner's request for a
17 certificate of appealability under 28 U.S.C. § 2253 (Docket No. 75).

18 **IT IS SO ORDERED.**

19 San Juan, Puerto Rico, this 31st day of August, 2009.

20 S/José Antonio Fusté
21 JOSE ANTONIO FUSTE
22 Chief U.S. District Judge